IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.842 OF 2006

Arif Hussain Sabbir Hussain
Shaikh @ Arif Panwala .. Appellant

Vs.

The State of Maharashtra .. Respondent

Mr.S.R.Chitnis, Sr. Counsel i/by K.Y.Mirza & Sharif Shaikh for the appellant

Mr.S.R.Borulkar, P.P. for the state

CORAM : J.N.PATEL &
R.S.MOHITE, JJ.

DATED : 19TH JANUARY, 2007

P.C.:
1. Heard.

2. This appeal is preferred challenging the order dt.17.08.06 passed by the Special Judge, (POTA) rejecting bail application of the appellant who is original accused no.11.

3. The appellant is prosecuted alongwith others for having committed offences u.s.302, 307,

326, 120-B, 427, 327, 332, 34 of the Indian Penal Code r/w section 5, 9 of the Indian Explosive Act r/w section 3 of the Explosive Substance Act r/w section 3 of the Prevention of damage to Public Property Act r/w section 151 of the Indian Railway Act and section 3 and 4 of the POTA on a charge that on 13.03.03 at about 20.36 hours, a Bomb Explosion took place at Mulund Railway Station in Karjat local train whereby 11 commuters were killed and 82 persons sustained injury, pursuance to which crime no.52 of 2003 came to be recorded and registered by Kurla Railway Police Station against the unknown persons and during the course of investigation, the said investigation was transferred to DCB, CID and came to be registered as C.R.No.21 of 2003.

4. It is the case of the prosecution that the applicant came to be arrested for having participated in the conspiracy to trigger series of blasts in the City of Mumbai and for his participation as a facilitator at Mulund Railway Station and for harbouring the prime suspect by name Taher Nisar Ansari @ Janab @ Yusuf Shaikh and

for acting as a conduit and communicating with the other conspirators, the prime suspects who are absconding.

5 The applicant filed an application for bail before the Special Judge which came to be rejected. Subsequently, the second application was preferred which was rejected solely on the ground that since there is no change in the circumstances and no new material has been brought on record, the application could not be entertained and, therefore, it was rejected without considering the said application on merits. Against the said order, the appellant preferred an appeal before the court and this court by its order dt.26.6.06 in appeal no.847 of 2006 remitted the matter to the Special Court to consider the application for bail preferred by the appellant on merits. This is how on 17.8.06, the learned Special Judge rejected the application which is the subject matter of challenge in this appeal.

6. Mr.Chitnis, the learned Senior Advocate appearing for the appellant submitted that except

for the confession of the co-accused in the case and telephone calls made and received from the two P.C.O.'s installed at the Pan-shop of the appellant, there is no material to show the complicity of the appellant.

7. Mr.Chitnis has submitted that as this charge sheet stands there is nothing on record even to frame charge against the appellant. According, to Mr.Chitnis in so far as the confession of co-accused in this case is concerned, it cannot be taken into consideration as held in the case of State (NCT of Delhi) vs. Navjot Sandhu, (2005) SCC (Cri) 1715 known as Parliament Attack case. He has also placed reliance upon the case of Kirtibai Madhavlal Joshi vs. State of Gujarat AIR 2006 4 SC 680 and contended that provisions of s.49 of POTA stands duly diluted if a person is held in custody for more than one year and that his case can be considered by the court for grant of appeal and, therefore, even otherwise, as the applicant is in custody for more than 3 years and the trial has not commenced, he deserves to be released on bail.

8. Mr.Borulkar, the learned P.P. strongly objects to the grant of bail on the ground that it would be premature to assess the case of the applicant for releasing him on bail taking into consideration the complicity of the applicant in the terrorist act. It is submitted that there is prima facie material to show the involvement of the applicant in the conspiracy and though strictly speaking, the confession of the co-accused cannot be admissible against the applicant but it does throw light to show that he is part of the conspiracy to trigger serial blasts in the city of Mumbai and the prime accused in the case known as Taher Nisar Ansari @ Janab @ Yusuf Shaikh who is absconding was in contact with the appellant who provided him with shelter and was also keeping contact with him through his cell phone.

9. Mr.Borulkar, the learned P.P. submitted that the court will have to take into consideration that it is very difficult for the investigating agency to collect direct evidence regarding the complicity of the applicant, as the prime suspects in the case are absconding and particularly Taher

Nisar Ansari @ Janab @ Yusuf Shaikh and therefore, for the present, whatever material is there, it has been rightly considered by the Special Court which has come to the conclusion that there is enough material against the applicant to frame charge and try him along with others in the said case.

10. Mr.Borulkar, the learned P.P. submitted that if this applicant is allowed to be released on bail, there is all likelihood of his absconding for the very reason that he is charged for having committed serious offence which may even invite capital punishment and therefore, the appeal deserves to be dismissed.

11. With the able assistance of Mr.Chitnis, the learned Senior Advocate and the learned P.P., we have not only gone through the material submitted by the prosecution in the form of charge sheet but also called for the case diary as the investigation in the matter is still not concluded for want of prime suspects. We have also examined the order of the Special Court who has rejected the application for bail. In so far as the applicant is concerned,

we find that the only material which has been brought on record in the course of investigation is the confession of the co-accused Noor Mohammed Ansari i.e. Original Accused No.7 and record from the MTNL to show that there were phone calls made and received at the two P.C.O.'s in the pan-shop of the applicant.

12. The special court has elaborately dealt with the facts of the case and has also spelt out the role attributed to the co-accused in the case and considered the material against the applicant accused ie. confession of co-accused, original accused no.7 and the telephonic calls and thereby came to a conclusion that it is not a case of no-evidence against the applicant and therefore he cannot be released on bail.

13. We do not want to make any observation in the matter as it may amount to express opinion on merits. It would be suffice to say that these two sets of material i.e. confession of the co-accused and communication made and received from the P.C.O. at the Pan-shop of the appellant accused are not

sufficient to hold back the applicant accused in custody by denying bail to him. It may be that in future if the prime suspects including Taher Nisar Ansari @ Janab @ Yusuf Shaikh are arrested and the investigating agency is able to collect further material against the appellant accused, his bail can be cancelled. Therefore, taking into consideration the material against the appellant accused, we are inclined to release him on interim bail on the following terms and conditions:

14. The appellant / applicant be released on interim bail on his furnishing P.R. bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with two sureties of Rs.50,000/- each subject to the conditions that the applicant shall report to DCB CID Unit No.6 on the first of every month and would not leave the city of Mumbai without the permission of the Special Court. We grant liberty to the prosecution to move the Special Court in case there is any further development in the investigation and material is collected showing complicity of the appellant. Appeal stands disposed of accordingly.

(SHRI J.N. PATEL, J)

(SHRI R.S.MOHITE, J)